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THE LAW OF UNINTENDED CONSEQUENCES: SUPREME COURT JURISDICTION OVER INTERLOCUTORY CLASS CERTIFICATION RULINGS*

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In recent decades the number of class actions filed in federal court has increased dramatically.[1] In many such cases, a ruling on the propriety of class certification effectively determines the outcome of the litigation. A denial of certification often means the end of the case because plaintiffs conclude that pursuing their claims on any basis other than as a class action fails to make economic sense. On the other hand, even in a case with relatively weak merits, certification may put what one court has described as "inordinate or hydraulic pressure" on defendants to settle in order to avoid the risk of substantial liability.[2] Despite the high stakes often dependent on

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1. Edward F. Sherman, *Group Litigation Under Foreign Legal Systems: Variations and Alternatives to American Class Actions*, 52 DePaul L. Rev. 401, 408 (2002) ("In the thirty-five years since the 1966 amendments, class actions have occupied an increasing share of American courts' attention."); *see also* Deborah R. Hensler et al., *Class Action Dilemmas: Pursuing Public Goals for Private Gain* 62-68 (Rand Corp. 2000) (noting "class action litigation has increased dramatically" and observing a "surge in damages class actions in recent years").

2. *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 164 (3d Cir. 2001); *see also Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978) ("Certification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense."); *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 145, 165-66 (2d Cir. 1987); *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 784-85 (3d Cir. 1995); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) ("Class certification [in mass tort cases] magnifies and strengthens the number of unmeritorious claims . . . . In addition to skewing trial outcomes, class certification creates insurmountable pressure on defendants to settle, whereas individual trials would not. The risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment

certification decisions, such rulings are interlocutory and therefore not appealable under 28 U.S.C. § 1291, the principal statute granting appellate jurisdiction to the courts of appeals.

In recognition of the proliferation of class actions and the benefits afforded by immediate review of certification rulings in some cases, the Federal Rules of Civil Procedure were amended in 1998 to allow interlocutory appellate review by courts of appeals of district court class certification rulings. Specifically, a new subsection was added to Rule 23, which addresses class actions in the federal courts.[3] Rule 23(f) provides:

> A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.[4]

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is low. These settlements have been referred to as judicial blackmail.") (citations omitted); *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298-99 (7th Cir. 1995) (noting "intense pressure to settle" after certification); *Kline v. Coldwell, Banker & Co.*, 508 F.2d 226, 238 (9th Cir. 1974) ("I doubt that plaintiffs' counsel expect the immense and unmanageable case that they seek to create to be tried. What they seek to create will become (whether they intend this result or not) an overwhelmingly costly and potent engine for the compulsion of settlements, whether just or unjust.") (Duniway, J., concurring); Irwin A. Horowitz & Kenneth S. Bordens, *Mass Tort Civil Litigation: The Impact of Procedural Changes on Jury Decisions*, 73 Judicature 22 (1989); Peter H. Schuck, *Mass Torts: An Institutional Evolutionist Perspective*, 80 Cornell L. Rev. 941, 958 (1995).

3. *See generally* Kenneth S. Gould, *Federal Rule of Civil Procedure 23(f): Interlocutory Appeals of Class Action Certification Decisions*, 1 J. App. Prac. & Process 309 (1999); Aimee G. Mackay, *Appealability of Class Certification Orders under Federal Rule of Civil Procedure 23(f): Toward a Principled Approach*, 96 Nw. U. L. Rev. 755 (2002); Michael E. Solimine & Christine Oliver Hines, *Deciding to Decide: Class Action Certification and Interlocutory Review by the United States Courts of Appeals Under Rule 23(f)*, 41 Wm. & Mary L. Rev. 1531 (2000).

4. Rule 23(f) was adopted in accordance with 28 U.S.C. § 1292(e), which "authoriz[es] th[e] [Supreme] Court to promulgate rules designating certain kinds of orders as immediately appealable." *Johnson v. Jones*, 515 U.S. 304, 310 (1995). Amendments to federal rules are adopted by the Supreme Court after approval by the Judicial Conference of the United States. Congress has a period prescribed by statute to act on any rules approved by the Supreme Court. If Congress does not enact legislation to reject or modify any proposed rules approved by the Court, such rules take effect. *See* 28 U.S.C. §§ 2071-2077 (2003) (available at http://uscode.house.gov); *see also Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997) (citation omitted) ("Federal Rules take effect after an extensive deliberative process involving many reviewers: a Rules Advisory Committee, public commenters, the Judicial Conference, this Court, the Congress.").

Both the Rule itself and the Advisory Committee Notes accompanying it suggest that courts of appeals have "unfettered discretion"[5] to decide whether to entertain review of a district court class certification ruling.[6] Although almost all circuits have set forth standards under which they will review a class certification ruling under Rule 23(f),[7] review has been granted in relatively few cases.[8]

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5. Fed. R. Civ. P. 23(f) comm. N.

6. As a formal matter, a party files an application in the form of a "petition for permission to appeal" the class certification ruling below on an interlocutory basis. Rule 23(f) provides that the application be filed within ten days after entry of the class certification order. *See* Fed. R. App. P. 5; Fed. R. Civ. P. 23(f). While this short deadline might have been reasonable were parties to submit terse petitions merely requesting review, in practice such petitions are typically lengthy, addressing the substance of the class ruling below. Ordinarily, if the request for review is granted, the court will issue a briefing schedule similar to that of other appeals.

7. *See Waste Mgt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 293 (1st Cir. 2000) (authorizing appeals under 23(f) when: (1) "a denial of class status effectively ends the case"; (2) "the grant of class status raises the stakes of the litigation so substantially that the defendant likely will feel irresistible pressure to settle"; (3) an appeal will permit the resolution of an unsettled legal issue, and (4) "district court's ruling on class certification is questionable"); *In re Sumitomo Copper Litig. v. Credit Lyonnais Rouse, Ltd.*, 262 F.3d 134, 139 (2d Cir. 2001) ("petitioners seeking leave to appeal pursuant to Rule 23(f) must demonstrate . . . that the certification order will effectively terminate the litigation and there has been a substantial showing that the district court's decision is questionable, or . . . that the certification order implicates a legal question about which there is a compelling need for immediate resolution"); *Newton*, 259 F.3d at 164 (court will exercise discretion under 23(f) when: (1) "denial of certification effectively terminates the litigation because the value of each plaintiff's claim is outweighed by the costs of stand-alone litigation; (2) . . . class certification places inordinate or hydraulic pressure on defendants to settle, avoiding the risk, however small, of potentially ruinous liability; and (3) . . . an appeal implicates novel or unsettled questions of law"); *Lienhart v. Dryvit Sys., Inc.*, 255 F.3d 138, 144 (4th Cir. 2001) (considering five factors for exercising 23(f) discretion: "(1) whether the certification ruling is likely dispositive of the litigation; (2) whether the district court's certification decision contains a substantial weakness; (3) whether the appeal will permit the resolution of an unsettled legal question of general importance; (4) the nature and status of the litigation before the district court"; and "(5) the likelihood that future events will make appellate review more or less appropriate") (citation omitted); *Bertulli v. Indep. Assn. of Continental Pilots*, 242 F.3d 290 (5th Cir. 2001) (applying general abuse of discretion standard); *In re Delta Air Lines*, 310 F.3d 953, 959 (6th Cir. 2002) ("eschew[ing] any hard-and-fast test in favor of a broad discretion to evaluate relevant factors that weigh in favor of or against an interlocutory appeal"), *cert. denied sub nom. Northwest Airlines Corp. v. Chase*, 539 U.S. 904 (2003); *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 834-35 (7th Cir. 1999) (authorizing appeals in "death knell" cases where class certification effectively terminates the litigation either because denial of certification makes the pursuit of individual claims prohibitively expensive or because grant of certification forces the defendants to settle, and where certification contributes to development of the law); *Glover v. Stand. Fed. Bank*, 283 F.3d 953 (8th Cir. 2002) (abuse of discretion); *Staton v. Boeing Co.*, 327 F.3d 938, 953 (9th Cir. 2003) (abuse of discretion); *Prado-Steiman ex rel. Prado*

Ordinarily, the only recourse for a litigant dissatisfied with a ruling or action by a court of appeals is to seek review from the Supreme Court. While there is no guarantee that the Court will agree to hear a case—in fact the odds are decidedly against it[9]—many litigants avail themselves of the right to request review. But does even the remote prospect of Supreme Court review exist when a party has been unsuccessful in persuading a court of appeals to grant its request for interlocutory review of a district court class certification ruling? More specifically, does the Court have jurisdiction under its certiorari authority to review either the court of appeals's denial of a Rule 23(f) petition, or the underlying substantive issues related to class certification? To date the Court itself has not answered this

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v. Bush, 221 F.3d 1266, 1274-76 (11th Cir. 2000) (considering: (1) "whether the district court's ruling is likely dispositive of litigation by creating 'death knell' for either plaintiff or defendant"; (2) "whether the petitioner has shown substantial weakness in class certification decision, such that decision likely constitutes abuse of discretion"; (3) "whether the appeal will permit resolution of unsettled legal issue that is important to particular litigation as well as important in itself"; (4) "nature and status of litigation before the district court"; and (5) "likelihood that future events may make immediate appellate review more or less appropriate"); *In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98, 99-100 (D.C. Cir. 2002) (interlocutory appeal pursuant to Rule 23(f) typically is appropriate when: (1) "there is a death-knell situation for . . . plaintiff or defendant that is independent of the merits of the underlying claims, coupled with a class certification decision by the district court that is questionable, taking into account the district court's discretion over class certification; (2) . . . the certification decision presents an unsettled and fundamental issue of law relating to class actions, important both to the specific litigation and generally, that is likely to evade end-of-the-case review; and (3) . . . the district court's class certification decision is manifestly erroneous"); *see also Christopher Village, L.P. v. U.S.*, 25 Fed. Appx. 922 (Fed. Cir. 2001) (unpublished) (finding Rule 23(f) inapplicable to certification of class actions in Court of Federal Claims, and ruling that a party may not seek interlocutory review of the denial of class certification under the rules of the Court of Federal Claims); *Stone Container Corp. v. U. S.*, 229 F.3d 1345, 1355 (Fed. Cir. 2000) (noting that the rules of the Court of International Trade do not allow for an interlocutory appeal of the denial of class certification, in contrast to Fed. R. Civ. P. 23(f)).

8. *See e.g. Daniels v. City of N.Y.*, 13 Fed. Appx. 20 (2d Cir. 2001) (unpublished); *Lienhart*, 255 F.3d 138; *Coleman v. Gen. Motors Acceptance Corp.*, 296 F.3d 443 (6th Cir. 2002); *Molski v. Gleich*, 318 F.3d 937 (9th Cir. 2003); *Heimmermann v. First Union Mortg. Corp.*, 305 F.3d 1257 (11th Cir. 2002), *cert. denied*, 123 S. Ct. 2641 (2003); *Franze v. Eq. Assurance*, 296 F.3d 1250 (11th Cir. 2002).

9. During the 2002 Supreme Court term, 1,869 paid cases (*i.e.*, excluding *in forma pauperis*) were filed. Of those, eighty-four cases were argued. During the 2001 term, 1,886 paid cases were filed, with eighty-eight of those argued. *See Supreme Court of the United States Chief Justice's 2003 Year-End Report on the Federal Judiciary* http://www.supremecourtus.gov/publicinfo/year-end/2003year-endreport.html (Jan. 1, 2004) (accessed July 22, 2004; copy on file with Journal of Appellate Practice and Process).

question,[10] and its prior decisions provide surprisingly little guidance about how the Court would rule were it to decide the issue.[11]

A. SUPREME COURT CERTIORARI JURISDICTION

The Supreme Court has "original jurisdiction" over certain types of cases specified in Article III of the Constitution,[12] but the scope of its jurisdiction is otherwise determined by Congress.[13] For about a century, beginning with the Judiciary Act of 1789, the Supreme Court's jurisdiction was entirely mandatory, and its review confined to cases in which the parties had a right to appeal. That changed with the Circuit Court of Appeals Act of 1891, which created the intermediate federal appellate system and granted the Supreme Court discretion to review certain types of cases decided by the circuit courts of appeals. That movement toward greater discretion for the Court in shaping its own docket continued with the Judiciary Act of 1925, after which, for the first time, the Court's cases reviewed by writ of certiorari outnumbered those reviewed on the basis of a mandatory appeal. Congress further revised the statutes governing the Court's jurisdiction in 1988,[14] so that "[w]ith but

10. The author participated in the preparation of a petition for a writ of certiorari that asked the Court to address the jurisdictional issue discussed here (as well as aspects of a district court's class certification order), which was denied by the Court. *See Northwest Airlines Corp. v. Chase*, 539 U.S. 904 (2003).

11. The Court itself would decide whether it has jurisdiction over class certification orders where the court of appeals has denied a request for review. While it might seem odd that the Court should decide the scope of its own authority, the federal courts are often confronted with general questions about their own jurisdiction. Indeed, the Court's landmark decision in *Marbury v. Madison*, 5 U.S. 137 (1803), required the Court to decide precisely such an issue. There is clearly no constitutional impediment to the Court deciding whether it has jurisdiction over this or similar questions.

12. *See* U.S. Const. art. III, § 2; *see generally* Erwin Chemerinsky, *Federal Jurisdiction* § 10.3.1, 624 (3d ed., Aspen L. & Bus. 1999); Laurence H. Tribe, *American Constitutional Law* § 3.5, 267 (3d ed., Foundation Press 2000).

13. *See U.S. v. United Mine Workers of Am.*, 330 U.S. 258, 363 (1947).

14. *See* Bennett Boskey & Eugene Gressman, *The Supreme Court Bids Farewell to Mandatory Appeals*, 121 F.R.D. 81 (1988) (providing an overview of Supreme Court jurisdiction).

the most minor of exceptions, the only path to Supreme Court review . . . [is] by petitioning for a writ of certiorari."[15]

As a result, today the source of jurisdiction for the vast majority of Supreme Court cases is 28 U.S.C. § 1254(1),[16] which provides that the Court may review by grant of a writ of certiorari "[c]ases in the [federal] courts of appeals."[17] With most appeals taken to the circuit courts as a matter of right, such as appeals of final orders under 28 U.S.C. § 1291, there is little doubt that once a notice of appeal is filed and the matter docketed, the case then resides "in" the courts of appeals. What distinguishes 23(f) petitions from virtually all other appellate proceedings is that the courts of appeals have "unfettered discretion"[18] to decide whether to grant review. The Supreme

15. Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law: Substance and Procedure* vol. 1, § 2.4 (3d ed., West 1988); *see also* Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 Colum. L. Rev. 1643 (2000) (tracing the history of the Court's certiorari jurisdiction).

16. In addition to 28 U.S.C. § 1254(1), the Court has broad power to grant review under the All Writs Act, 28 U.S.C. § 1651. The Act has been used by the Court on occasion as a jurisdictional basis to review district court rulings that a court of appeals declined to review. *See e.g. In re 620 Church St. Bldg. Corp*, 299 U.S. 24, 26 (1936) (analysis under 28 U.S.C. § 377, precursor to § 1651). The Act, however, is rarely invoked by the Court, and is unlikely to be employed as a basis to review a class certification ruling. *See* S. Ct. R. 20(1) (discretion to exercise writ "sparingly exercised" in only "exceptional circumstances"). The writ of certiorari under Section 1651(a) is generally described as the "common law" writ. *See* Robert L. Stern et al., *Supreme Court Practice* 580 (8th ed., BNA 2002); *see also* Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure: Jurisdiction* vol. 16B, § 4005 (2d. ed., West 1996) (discussing extraordinary writ jurisdiction).

17. Separate provisions govern direct appeals from decisions of three-judge courts, from state courts, from the Supreme Court of Puerto Rico, and from the Court of Appeals for the Armed Forces. *See* 28 U.S.C. §§ 1254, 1257-59 (available at http://uscode.house.gov).

18. The language of Rule 23(f) prescribes no criteria to be used in the exercise of the appellate court's discretion when deciding whether to grant or deny review. Presumably, however, there are limits on the exercise of that discretion. For instance, it seemingly would be impermissible for a decision to be grounded on a constitutionally impermissible basis. The Advisory Committee Notes accompanying Rule 23(f) do observe that the court of appeals has "unfettered discretion whether to permit an appeal," but the Court is not bound by interpretations of Rules or statutes reflected in the Advisory Committee Notes. *See e.g. Hohn v. U.S.*, 524 U.S. 236, 245 (1998) ("We must reject the suggestion contained in the Advisory Committee's Notes on Federal Rule of Appellate Procedure 22(b) that '28 U.S.C. § 2253 does not authorize the court of appeals as a court to grant a certificate of probable cause.'"); *see also* Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. Pa. L. Rev. 1099, 1152 (2002) (noting the Court "consistently refuses to accord the [Advisory Committee] Notes binding authority").

Court would have certiorari jurisdiction over a class certification ruling that the court of appeals declined to review under Rule 23(f) only if the "case" is "in the court of appeals."[19] But can a "case" be "in" a court of appeals either despite, or by virtue of, a request and denial for review under Rule 23(f), as those terms are used in Section 1254(1)?

1. The Origins of 28 U.S.C. § 1254(1)

Section 1254(1) traces its roots to the 1911 version of a predecessor statute known as Section 240 of the Judicial Code, which provided:

> In any case, civil or criminal, *in which the judgment or decree of the circuit court of appeals is made final by the provisions of this Title*, it shall be competent for the Supreme Court to require, by certiorari or otherwise, upon the petition of any party thereto, any such case to be certified to the Supreme Court for its review and determination, with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court.[20]

Under this provision, the Supreme Court's certiorari power was confined to those cases in which the judgment or decree of the circuit court of appeals was not reviewable by appeal or writ of error.

That changed in 1925, when Congress enlarged the Court's certiorari jurisdiction and reduced mandatory appeals.[21] That version of the statute provided:

> In any *case*, civil or criminal, *in a circuit court of appeals* . . . it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto . . . to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the

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19. *See* Wright et al., *supra* n. 16, at § 4036, 14 (observing that "[p]eculiar difficulties have been encountered in establishing review of cases that arguably are not 'in' the court of appeals because of failure to secure a required permission for appeal").

20. 28 U.S.C. § 347 (1940) (emphasis added).

21. *See* Pub. L. No. 415, ch. 229, § 1, 43 Stat. 936, 936 (1925) (amending § 240 of the Judicial Code of 1911 to allow certiorari upon petition of either party and amending § 238 of the Judicial Code of 1911 to restrict direct review by the Supreme Court of district court judgments).

> Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal.[22]

Notably, with this revision of the statute, granting the Court certiorari authority over non-final judgments or decrees of courts of appeals, Congress first imposed the requirement that a "case" be "in" a court of appeals as a predicate for certiorari jurisdiction.

The 1925 version of the statute remained in effect until the current version of Section 1254(1) was adopted in 1948, as part of a sweeping revision of Title 28 of the United States Code, which contains the principal provisions concerning the federal judiciary.

2. Decisions Bearing on Section 1254(1)'s Operative Language

Even though the relevant language from Section 1254(1) traces its origins back to the early 1900s, there has been remarkably little discussion of that language in the Court's opinions. The first extended discussion came in *Mayo v. House*.[23] There, the Court considered a petition for certiorari where the district court denied both a petition for a writ of habeas corpus and a request for a certificate of probable cause, and the court of appeals denied an application for an appeal in forma pauperis. Analyzing the predecessor to Section 1254(1) then in effect, the Court concluded it was not authorized to issue a writ of certiorari because "the case was never 'in' the court of appeals, for want of a certificate of probable cause."[24] Nevertheless, the Court granted certiorari under the version of the All Writs Act operative at the time,[25] reversed the order of the court of appeals and the judgment of the district court, and remanded to the district court.[26]

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22. *Id.* (emphasis added); *see Gay v. Ruff*, 292 U.S. 25, 30 (1934) ("sole essential of this Court's jurisdiction to review is that there be a case pending in the circuit court of appeals").

23. 324 U.S. 42 (1945).

24. *Id.* at 44.

25. 28 U.S.C. § 377 (West 1940).

26. A precursor to *Mayo* was *Ferguson v. Dist. of Columbia*, 270 U.S. 633, 633-34 (1926) (per curiam), in which the Court denied a certiorari petition for "want of jurisdiction" after the court below refused to allow a writ of error. *Ferguson* was cited four

Although, as a formal matter, this holding remained undisturbed for decades, on many occasions after *Mayo* the Court issued rulings seemingly inconsistent with *Mayo*'s holding about the scope of the Court's certiorari jurisdiction. For instance, several times the Court granted certiorari following denial of a certificate of probable cause by a court of appeals.[27] Those decisions did not address the apparent tension with *Mayo* and were rendered by the Court with little fanfare—at least until 1981, when the Court directed renewed attention to this issue.

First, in *Jeffries v. Barksdale*,[28] then-Justice Rehnquist, along with then-Chief Justice Burger and Justice Powell, dissented from the denial of certiorari in a habeas case in which the court of appeals had turned down the application for a certificate of probable cause. Relying on the "plain words" of Section 1254(1), the three reasoned that "[s]ince there was no certificate of probable cause issued in this case, it was never 'in' the Court of Appeals . . . . Since the case was never in the Court of Appeals we cannot review it by writ of certiorari to that court."[29] Given the absence of authority for the Court to grant a writ of certiorari, they concluded that the petition for certiorari should have been *dismissed* rather than *denied*.

Less than four months later the issue resurfaced in *Davis v. Jacobs*,[30] a decision relating to seventeen petitions for certiorari. This time Justice Stevens joined the three Justices dissenting in *Jeffries* in concluding that because the petitioners had not obtained certificates of appealability, "none of these cases was properly 'in' the Court of Appeals" and that the Court lacked jurisdiction to grant the petition for certiorari.[31] Justice Stevens nonetheless disagreed with the suggestion that the Court adopt

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decades later by the Court as holding that Section 1254(1) "did not permit review by writ of certiorari of cases where the Court of Appeals . . . refused to allow an appeal." *Hicks v. Dist. of Columbia*, 383 U.S. 252, 253 n. 1 (1965). There, the Court instead predicated jurisdiction "on its power" to issue a common-law writ of certiorari. *Id.* (citing *Mayo*).

27. *See e.g. Smith v. Digmon*, 434 U.S. 332 (1978) (per curiam) (granting certiorari after district court rejected petition for habeas corpus and court of appeals denied request for certificate of probable cause); *Humphrey v. Cady*, 405 U.S. 504 (1972) (granting certiorari after district court dismissed petition for habeas corpus and court of appeals denied request for certificate of probable cause).

28. 453 U.S. 914 (1981).

29. *Id.* at 915-16.

30. 454 U.S. 911 (1981).

31. *Id.* at 912.

the practice of dismissing petitions rather than denying them in such circumstances, on the grounds that determining in every case whether the form of an order should be a denial or dismissal was "not a trivial matter" and was an unwarranted change in the Court's practice.[32]

Despite this flurry of attention, after 1981 the Court did not return to this distinction between dismissals and denials of certiorari petitions suggested by Section 1254(1). Instead, it continued its practice of granting certiorari in some cases even where a certificate of probable cause had been denied—notwithstanding that *Mayo* formally remained "good law."[33]

During roughly the same period as these habeas cases were being considered, the Court also decided two cases involving President Nixon in which it addressed (albeit briefly) the critical language from Section 1254(1). In *United States v. Nixon*,[34] the Court was presented with a petition for certiorari by then-sitting President Nixon. In connection with the prosecution of criminal charges against certain individuals related to Watergate, a third-party subpoena had been issued directing the President to produce tape recordings and documents related to his conversations with aides and advisors. The district court denied the President's motion to quash the subpoena. The President appealed to the court of appeals, but both the government and the President requested certiorari even before judgment by the court of appeals. After explaining that "[t]he threshold question" was whether the case was "properly 'in' the Court of Appeals when the petition for certiorari was filed in this Court," the Court observed (without discussion) that "the appeal was timely filed and all other procedural requirements met, and [the case was] . . . properly 'in' the Court of Appeals."[35]

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32. *Id.* at 914-15.

33. *See e.g. Lynce v. Mathis*, 519 U.S. 433 (1997) (granting certiorari after district court and court of appeals denied requests for certificate of probable cause); *Allen v. Hardy*, 478 U.S. 255 (1986) (per curiam) (granting certiorari after district court and court of appeals denied requests for certificate of probable cause). In these cases the Court did not expressly address the basis for its jurisdiction, although petitioners had invoked the Court's authority under Section 1254(1), and it would be exceedingly unusual for the Court to base its jurisdiction on the All Writs Act without saying so, particularly when petitioners invoked the Court's certiorari authority.

34. 418 U.S. 683, 690-92 (1974).

35. *Id.* at 692.

In *Nixon v. Fitzgerald*,[36] a former government employee filed a civil suit against then-former President Nixon seeking damages based on actions taken by the President while in office. Nixon's claim of absolute immunity was rejected by the district court, and the court of appeals summarily dismissed his appeal for lack of jurisdiction. The Supreme Court granted certiorari to address the scope of presidential immunity. Before proceeding to the substance of that issue, however, the Court rejected Respondent's argument that the district court's order was not a "case" properly "in" the court of appeals, and therefore was not subject to review under Section 1254(1). Having determined that the case fell within the small class of interlocutory orders immediately appealable under the "collateral order" doctrine,[37] the Court found that the court of appeals erred in concluding it lacked jurisdiction to hear Petitioner's appeal. It therefore followed, the Court explained, "that the case was 'in' the Court of Appeals under § 1254 and properly within [its] certiorari jurisdiction."[38]

By far the most extensive discussion of the critical language from Section 1254(1) appeared relatively recently, in *Hohn v. United States*.[39] Hohn had been convicted under 18 U.S.C. § 924(c) for "use" of a firearm during the commission of a drug offense. Two years after his conviction, in an unrelated case, the Supreme Court interpreted Section 924(c) in a way that made clear Hohn had been convicted by a jury given improper instructions about the meaning of the statute. Hohn filed a motion to vacate his conviction on the ground the evidence at trial was insufficient to convict him under a proper construction of Section 924(c). The district court denied Hohn's motion, and also denied his request for a certificate of appealability, which was required under a new federal law to appeal the denial of a petition for habeas corpus.[40] Under the new law, the court of

36. 457 U.S. 731 (1982).

37. *See Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949); *see also* Wright et al., *supra* n. 16, at vol. 16, § 3911 (discussing "collateral order" doctrine).

38. 457 U.S. at 743.

39. 524 U.S. 236 (1998).

40. The certificates of appealability required under the new law were functional equivalents of what had been known as certificates of probable cause. *See generally* Limin Zheng, *Actual Innocence as a Gateway through the Statute-of-Limitations Bar on the Filing of Federal Habeas Corpus Petitions*, 90 Cal. L. Rev. 2101 (2002).

appeals could also issue a certificate of appealability, but declined to do so by a two-to-one panel vote.[41]

Hohn then filed a petition for a writ of certiorari with the Supreme Court.[42] The Court granted certiorari to decide whether it has jurisdiction to review decisions of courts of appeals denying applications for certificates of appealability.

Justice Kennedy delivered the opinion of the Court, joined by Justices Stevens, Souter, Ginsburg and Breyer. The majority first explained that Hohn's application for a certificate of appealability constituted a "case," as the term is used in Section 1254(1). Among the factors cited by Justice Kennedy were that the matter was entered on the docket of the court of appeals, submitted to a panel, and decided in a published opinion, which included a dissent; that the court of appeals entered judgment, issued a mandate and entertained a petition for rehearing and suggestion for rehearing *en banc*; and that the court of appeals acknowledged its decision made circuit law (*i.e.*, the decision was precedential). The majority also "drew guidance" from the fact that all but one court of appeals had adopted rules to govern the disposition of certificate applications, observing that "[t]hese directives would be meaningless if applications for certificates of appealability were not matters subject to the control and disposition of the courts of appeals."[43]

The majority further concluded that Hohn's "case" was "in the court of appeals," as the phrase is used in Section 1254(1),

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41. *Hohn v. U.S.*, 99 F.3d 892 (8th Cir. 1996), *vacated*, 524 U.S. 236 (1998).

42. In response to Hohn's certiorari petition the Solicitor General of the United States effectively sided with Hohn and suggested that the Court vacate the decision of the Court of Appeals and remand for further consideration of whether a certificate of appealability should issue. On the jurisdictional issue, the Solicitor General's brief remarked that "[t]he Court lacks jurisdiction under Section 1254(1) to review the merits of an underlying [federal habeas] motion until a certificate of appealability has issued." *See* Br. of the U.S. at 8, *Hohn v. U.S.*, 524 U.S. 236 (1998) (citing *Mayo* as adverse precedent) (available at 1997 WL 799988). The Solicitor General's brief further suggested that the Court "arguably has jurisdiction under Section 1254(1) . . . to review the denial by a court of appeals of an application for a certificate of appealability . . . [but] jurisdiction [under the statute] appears to be foreclosed by th[e] Court's precedent." *Id.* Accordingly, the Solicitor General urged the Court to invoke its common law certiorari authority under the All Writs Act to reverse and remand for further consideration. Given that petitioner and the government took substantially similar positions in the case, the Court appointed Jeffrey Sutton (who had clerked for Chief Justice Rehnquist and is now a judge on the United States Court of Appeals for the Sixth Circuit) as amicus curiae to argue against the Court's jurisdiction.

43. *Hohn*, 524 U.S. at 243.

observing that a request to proceed before a court of appeals should not be "regarded as a threshold inquiry separate from the merits which, if denied, prevents the case from ever being *in the court of appeals*."[44] According to the majority, the Court's precedents

> foreclose the proposition that the failure to satisfy a procedural threshold prerequisite for court of appeals jurisdiction, such as the issuance of a certificate of appealability, prevents a case from being in the court of appeals for purposes of § 1254(1).[45]

Justice Scalia authored a dissenting opinion, joined by Chief Justice Rehnquist and by Justices O'Connor and Thomas. The dissent strongly disputed the idea that Section 1254(1) conferred upon the Court jurisdiction over Hohn's petition for certiorari. In Justice Scalia's view, the denial of Hohn's request for a certificate of appealability to review the district court order foreclosed Supreme Court review: "Because it could not be taken *to* the Court of Appeals, it quite obviously was never *in* the Court of Appeals; and because it was never in the Court of Appeals, we lack jurisdiction under § 1254(1) to entertain it."[46] Although Justice Scalia called the majority's view that Hohn's request was "in" the court of appeals the "most obvious of [the] Court's statutory distortions," he also rejected the notion that a request for a certificate of appealability was a "case" within the meaning of Section 1254(1), describing the majority's view as a "jaw-dropper" with "serious collateral consequences."[47] According to the dissent, the request for a certificate of appealability "does not have the requisite qualities of a legal 'case' under any known definition. . . . It is nothing more than a request for permission to seek review."[48]

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44. *Id.* at 246 (emphasis added).

45. *Id.* at 248.

46. *Id.* at 254 (Scalia, J., dissenting).

47. *Id.* at 256.

48. *Id.*; *see also id.* ("The request for a COA is not some separate 'case' that can subsist apart from that underlying suit; it is merely a procedural requirement that must be fulfilled" before petitioner's action "can advance to the appellate court."); *id.* at 258 ("threshold procedural requirement that petitioner must meet in order to carry his § 2255 suit to the appellate stage"); *id.* at 260 n. 2 ("Not until today has anyone thought that a 'case' could consist of a disembodied request for appeal."). In support of the idea that no case was before the court of appeals in Hohn's case, Justice Scalia also noted that "[i]t does not

B. SUPREME COURT CERTIORARI JURISDICTION OVER CLASS CERTIFICATION RULINGS FOLLOWING REQUESTS FOR REVIEW UNDER RULE 23(F)

What do the language of Section 1254(1) and the Court's precedents suggest about how the Court would rule, and should rule, were it to decide whether it has jurisdiction to review a class certification order where the court of appeals has denied (or failed to act upon) a Rule 23(f) petition?[49]

As a predictive matter, the Justices who comprised the majority in *Hohn* appear likely to employ a relatively expansive interpretation of Section 1254(1). *Hohn* obviously concerned different substantive issues than would be presented in any Rule 23(f) petition, and it arose in a procedural context in which the court of appeals was the end of the line for the petitioner absent Supreme Court review. However, nothing the majority said in *Hohn* suggests that its analysis of the statutory language from Section 1254(1) depended on the fact that a denial of review would effectively terminate the petitioner's claims, and there is no reason to think that it would employ a restrictive interpretation of Section 1254(1) that it declined to adopt in *Hohn*.

On the other hand, the dissenting Justices in *Hohn* concluded, without any equivocation, that a request for review is not a "case" and cannot be "in" the court of appeals, as those terms are used in Section 1254(1). While their analysis of the jurisdictional question in *Hohn* may have reflected their views on habeas corpus jurisprudence generally, and their reactions to Congress's effort to limit the availability of habeas petitions in particular, it appears unlikely they would evaluate Section 1254(1) differently in the context of a denied Rule 23(f)

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assert a grievance against anyone, does not seek remedy or redress for any legal injury, and does not even require a 'party' on the other side." *Id.* at 256.

49. The closest analogue to Rule 23(f) is 28 U.S.C. § 1292(b), which allows for interlocutory appellate review when the district court certifies an issue and the court of appeals agrees to consider the issue. Even though Section 1292(b) has been in effect since 1958, the Court has never addressed its jurisdiction to review an issue certified by a district court under Section 1292(b) that the court of appeals declined to review—and therefore has never interpreted Section 1254 in that context.

petition.[50] How these Justices would rule were they confronted with the jurisdictional question addressed here is, therefore, likely to turn on their perception of *Hohn*'s precedential effect. The entire Court has already abided by *Hohn* as applied to subsequent habeas cases involving certificates of appealability.[51] Yet the forceful opposition to an expansive interpretation of Section 1254(1) expressed by those dissenting in *Hohn* provides reason to doubt they will feel compelled by principles of *stare decisis* to construe the statute as conferring jurisdiction on the Court after the denial of a Rule 23(f) petition.[52] Thus, if the

50. *See* Wright et al., *supra* n. 16, at vol. 17, § 4036, 18 ("The tensions evident in the *Hohn* opinions surely arise as much from the common passions that surround federal habeas corpus review of state convictions as from the more rarified passions generated by debate whether Supreme Court review should be effected by statutory certiorari or common-law certiorari.").

51. *See Miller-El v. Cockrell*, 537 U.S. 322 (2003) (deciding case after denial of certificate of appealability by court of appeals); *see also Tennard v. Dretke*, 124 S. Ct. 2562 (2004) (six Justices finding that the Fifth Circuit erred in not issuing a certificate of appealability; three Justices dissenting on grounds that no certificate of appealability was warranted, but not contesting the Court's jurisdiction). In at least two other AEDPA cases, the Court has (understandably) described the holding of *Hohn* in narrow terms. *See Woodford v. Garceau*, 123 S. Ct. 1398, 1403 (2003) ("Although we concluded [in *Hohn*] that an application for a COA constituted a case within the meaning of Section 1254, we did not provide an all-purpose definition of the term 'case.'"); *Slack v. McDaniel*, 529 U.S. 473, 482 (2000) (citing *Hohn* for the proposition that "[u]nder AEDPA, an appellate case is commenced when the application for a COA is filed").

52. Some commentators have argued that principles of *stare decisis* deserve greatest adherence in the context of statutory interpretation. *See e.g.* Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 Geo. L.J. 281 (1989); Lawrence C. Marshall, *"Let Congress Do It": The Case for an Absolute Rule of Statutory Stare Decisis*, 88 Mich. L. Rev. 177 (1989). Justice Scalia argued as much in *Hohn*, 524 U.S. at 261 (Scalia, J., dissenting) ("[S]tare decisis effect is increased by the fact that it was a statutory holding."). Although this argument was marshaled *against* an expansive interpretation of Section 1254(1) in *Hohn*, it could make it *more likely* the Justices dissenting in *Hohn* would vest the Court's decision with a broad precedential effect, since *Hohn* represents the Court's current construction of the statute. Justice Scalia also argued that Congress adopted the Court's ruling in *Mayo*, contending that "statutes are deemed to adopt the extant holdings" of the Court. 524 U.S. at 262 (citing *Keene Corp. v. U.S.*, 508 U.S. 200, 212 (1993) ("[W]e apply the presumption that Congress was aware of these earlier judicial interpretations [or predecessor statute] and, in effect, adopted them."). There are two major problems with such an argument, however. First, as discussed, many decisions rendered by the Court after *Mayo* departed from its holding, granting certiorari in situations analogous to that in *Hohn*. If it was reasonable for members of Congress to rely on Court precedent in deciding whether they need address an issue, it was also reasonable to expect those members to be aware of *all* of the Court's decisions. Second, the failure to amend the Court's jurisdictional statute to ensure that the Court did not grant certiorari in a case like that of *Hohn* cannot be excused by Congress's expectation that the Court would rule any particular way if presented with the question. Congressional expectation that the Court will read a

Court does take up this issue, its decision may well reflect sharp divisions similar to those apparent in *Hohn*.

From a normative standpoint, although the question is principally one of statutory interpretation,[53] nothing about the words,[54] the structure, or the legislative history of Section 1254(1) themselves determine whether the Court has jurisdiction to review a class certification ruling where a Rule 23(f) petition has been denied by the court of appeals.[55] Instead, the meaning of the statute is best derived from the Court's precedent and practices—and these suggest that the Court *does* have certiorari jurisdiction to evaluate a district court class certification ruling[56]

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statute in a particular way does not excuse the legislature from writing the laws to conform with how it expects the Court to rule.

53. The starting point for statutory interpretation is, of course, the language of the statute at issue. *See Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 833 (2002) (considering appellate jurisdiction of Court of Appeals for the Federal Circuit and observing "[o]ur task here is not to determine what would further Congress's goal of ensuring patent-law uniformity, but to determine what the words of the [jurisdiction-conferring] statute must fairly be understood to mean"); *Carter v. U.S.*, 530 U.S. 255, 271 (2000) ("In analyzing a statute, we begin by examining the text . . . not by 'psychoanalyzing those who enacted it.'" (citations omitted)); *Est. of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992) ("In a statutory construction case, the beginning point must be the language of the statute, and when a statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished." (citation omitted)).

54. The terms "case" and "in" have no apparent "plain" meaning in the context of Section 1254(1). Although there is some intuitive appeal to the idea that a matter (be it for a certificate of appealability or for permission to appeal) cannot have come to be "in" the court of appeals if permission for review was *denied*, there is equal intuitive appeal to the idea that the matter must have been "in" the court for the court of appeals to rule on it.

55. Although the role of legislative history has been the subject of considerable discussion in recent years by both the Court and commentators, the legislative history of Section 1254(1) provides no guidance about how it should be interpreted. *See generally* Charles Tiefer, *The Reconceptualization of Legislative History in the Supreme Court*, 2000 Wis. L. Rev. 205.

56. Once the Court has certiorari jurisdiction under Section 1254(1), that jurisdiction extends to review the district court's certification ruling; it is not limited to determining whether the court of appeals erred in denying the request for interlocutory review. The language of Section 1254(1) sets out no limitations on the scope of the Court's review after its prerequisites are satisfied—that is, once a "case" is "in" the court of appeals. The Court's precedents similarly suggest that once a "case" is "in" the appeals court it may address any aspect of the matter it deems appropriate. *See Lynce v. Mathis*, 519 U.S. 433 (1997) (granting certiorari and addressing merits after district court and court of appeals denied requests for certificate of probable cause); *Nixon v. Fitzgerald*, 457 U.S. 731, 743 n. 23 (1982) ("Nor, now that we have taken jurisdiction of the case, need we remand to the Court of Appeals for a decision on the merits."); *cf. Schlagenhauf v. Holder*, 379 U.S. 104, 112 (1964) (after the court of appeals refused to grant mandamus to address a discovery

once a Rule 23(f) petition has been filed with the court of appeals, regardless of whether that court denies the request or fails to act on it.[57]

As discussed above, the Court's decisions during the more than half century between *Mayo* and *Hohn* collectively represent the repudiation of a narrow or mechanical construction of 1254(1),[58] while *Hohn* (and the few subsequent decisions discussing it) support the conclusion that the Court has jurisdiction notwithstanding the denial of a Rule 23(f) petition.

For example, *Hohn* and subsequent cases have determined that an application for a certificate of appealability constitutes a "case" within the meaning of Section 1254(1). The *Hohn* majority described a "case" as a matter "subject to the control and disposition of the court of appeals."[59] Although it remains to be seen whether the Justices accept this as a general test for what constitutes a "case" under Section 1254(1),[60] it appears clear that a request for action from a court of appeals specifically authorized by a statute or rule, including a request for review in

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issue on an interlocutory basis, the Court elected to "determine on the merits the issues presented"); *see also* Wright et al., *supra* n. 16, at vol. 17, § 4036, 19 ("Once a case has come to be in the court of appeals, there is power to issue certiorari without any limitation . . . .").

57. There is little doubt that once a Rule 23(f) petition is granted the "case" is "in" the court of appeals, and the Court has jurisdiction under Section 1254(1). *See U.S. v. Cherokee Nation of Okla.*, 480 U.S. 700 (1987); *see also* Wright et al., *supra* n. 16, at vol. 17, § 4036, 28 n. 50 ("The Court regularly reviews cases decided in courts of appeals on appeal under 28 U.S.C § 1292(b) without further comment on its own jurisdiction.").

58. The *Hohn* majority accurately observed that "the rule of procedure announced in *House v. Mayo* has often been disregarded" in the Court's own practice. 524 U.S. at 252. The brief submitted by the Solicitor General's Office in *Hohn* also observed that "[m]any of the cases decided since [*Mayo*] . . . raise some doubts about whether the Court has adhered to the view that it lacks jurisdiction under Section 1254(1) to review [a] denial of a certificate [of probable cause or appealability]." *See* Br. of U.S. at 23, *Hohn v. U.S.*, 524 U.S. 236 (1998) (available at 1997 WL 799988). One commentator appears to have ignored these post-*Mayo* decisions when describing *Hohn* as a "striking example of failed judicial restraint" because the Court overruled *Mayo* "without a compelling reason" and failed to abide by principles of stare decisis. *See* Student Author, *Federal Jurisdiction and Procedure: Supreme Court Certiorari Jurisdiction*, 112 Harv. L. Rev. 263, 269 (1998).

59. 524 U.S. at 243.

60. *See Woodford v. Garceau*, 123 S. Ct. 1398, 1403 (2003) ("[W]e concluded [in *Hohn*] that an application for a COA constituted a case within the meaning of Section 1254."); *Slack v. McDaniel*, 529 U.S. 473, 482 (2000) ("Under AEDPA, an appellate case is commenced when the application for a COA is filed.").

accordance with Rule 23(f), can constitute a "case" for purposes of satisfying Section 1254(1).[61]

Hohn also supports the conclusion that a request for permission to appeal under Rule 23(f) is "in" the court of appeals, as the term is used in Section 1254(1).[62] There, the Court explained that a request to proceed before a court of appeals should not be "regarded as a threshold inquiry separate from the merits which, if denied, prevents the case from ever being *in the court of appeals*,"[63] and that "the failure to satisfy a threshold prerequisite for court of appeals jurisdiction, such as the issuance of a certificate of appealability, [does not] prevent[] a case from being in the court of appeals for purposes of Section 1254(1)."[64] Thus, under *Hohn*, once a *request* for review is made, the matter is "in" the court of appeals, whether the request is granted, denied, or not acted upon.[65]

Moreover, the conclusion that a case is "in" the court of appeals once a Rule 23(f) petition is granted, but not "in" that court when a petition is denied, would produce strange results.

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61. The leading treatise on Supreme Court practice seemingly also reads the Court's precedents as consistent with an assertion that the Court has jurisdiction after the denial of a Rule 23(f) petition. *See* Stern et al., *supra* n. 16, at 71 ("[T]he Court has given a broad interpretation to the word 'cases' so as to include not only a full-blown appeal from a district court decision but also any kind of motion or application made to a court of appeals that results in an order bearing the imprimatur of the court of appeals or a judge thereof.").

62. *See* Wright et al., *supra* n. 16, at vol. 17, § 4036, 10 ("The greatest opportunity for imposing technicalistic difficulties [on the exercise of the Court's jurisdiction under Section 1254(1)] is presented by the statutory requirement that the case be 'in' the court of appeals, but no genuine obstacle has in fact resulted.").

63. 524 U.S. at 246 (emphasis added).

64. *Id.* at 248.

65. The Court's approach in cases involving denials by court of appeals of requests for mandamus during that period similarly suggests the Court has jurisdiction to review a class certification ruling after the denial of a Rule 23(f) petition. *See e.g. Mallard v. S.D. Iowa*, 490 U.S. 296, 300 (1989) (certiorari granted after court of appeals denial of writ of mandamus without opinion); *Schlagenhauf v. Holder*, 379 U.S. 104 (1964). The petitions for certiorari and merits briefs in *Mallard* and *Schlagenhauf* reveal the parties invoked 28 U.S.C. § 1254(1) as the basis for the Court's jurisdiction in those cases. This past term the Court granted certiorari in a high profile case involving Vice President Cheney. *See Cheney v. U.S. Dist. Ct. for Dist. of Columbia*, 124 S. Ct. 2576 (2004) (vacating Court of Appeals's order declining to issue writ of mandamus and remanding for reconsideration of whether writ should issue). In neither its order granting certiorari nor its decision did the Court address the basis for its jurisdiction, although Petitioners invoked 28 U.S.C. § 1254(1) in their filings, and Respondents did not challenge Petitioners' reliance on the statute as the basis for the Court's jurisdiction. *See id.*; *Cheney v. U.S. Dist. Ct. for Dist. of Columbia*, 540 U.S. 1088 (2003) (granting certiorari).

Compare one situation, in which the court of appeals grants a petition for review and then issues a substantive opinion affirming the class certification order below, with another, in which the court of appeals issues a substantive opinion analyzing the class certification order below, but instead of affirming, elects to deny the petition.[66] Under the approach of the dissenting Justices in *Hohn*, the Court would have jurisdiction in the former situation but not the latter. The approach of the *Hohn* majority yields a more sensible result,[67] where the Court's jurisdiction does not turn on the procedural description selected by the court of appeals.[68]

Although it might seem strange that the addition of a procedural rule would result in the Court having jurisdiction over matters previously outside its purview, upon closer examination this is a foreseeable outcome of the interplay between Section 1254(1) and the web of statutes and rules dictating what comes before the courts of appeals.[69] Under

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66. *See* Wright et al., *supra* n. 16, at vol. 17, § 4036, 18 (The circumstances of *Hohn v. United States* clearly illustrate the merits-like review that may enter a decision to deny a certificate of appealability.).

67. Although *Hohn* appears to have been decided correctly, not all of the majority's opinion is compelling. For instance, the majority seemingly attempted to draw support for its ruling by reasoning that such a ruling would allow the Court to carry out its "normal function of reviewing possible misapplications of law by the courts of appeals without having to resort to extraordinary remedies [i.e., the All Writs Act, 28 U.S.C. § 1651]." 524 U.S. at 251. It is unclear how or why the construction of Section 1254(1) does or should turn on an analysis of the All Writs Act as a possible source of jurisdiction. Arguably such reasoning could bear on assessing congressional intent, but the majority makes no such suggestion.

68. The notion that the Court has jurisdiction under Section 1254(1) despite the denial of a Rule 23(f) petition is consistent with the Court's authority to exercise jurisdiction before issues have been addressed by a court of appeals. The Court has on many occasions granted certiorari to review district court orders even before they have been substantively reviewed by an intermediate appellate court. *See* 28 U.S.C. § 2101(e) (available at http://uscode.house.gov) ("An application to the Supreme Court for a writ of certiorari to review a case before judgment has been rendered in the court of appeals may be made at any time before judgment."); Sup. Ct. R. 11; *see also Mistretta v. U.S.*, 488 U.S. 361 (1989); *Dames & Moore v. Regan*, 453 U.S. 654 (1981); *U.S. v. United Mine Workers of Am.*, 330 U.S. 258 (1947); *see also Nixon v. Fitzgerald*, 457 U.S. 731 (1982) (deciding merits of interlocutory district court order regarding claims of absolute immunity after court of appeals dismissed appeal for lack of jurisdiction); *McElroy v. U.S.*, 361 U.S. 281 (1960) (certiorari granted before argument in court of appeals but after appeal was "perfected").

69. Rule 23(f) itself neither enlarged nor contracted the Court's jurisdiction, since a change in a procedural rule cannot "abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b) (available at http://uscode.house.gov); *cf. Snyder v. Harris*, 394 U.S. 332,

Section 1254(1), any statute or rule that brings a matter before a court of appeals will also bring that matter within the reach of the Supreme Court.[70] Rule 23(f) presents a wrinkle in this dynamic, in that it specifies that courts of appeals may elect whether to grant interlocutory review. But a request for review authorized by a statute or rule should bring that matter within the certiorari jurisdiction of the Supreme Court, regardless of how the court of appeals responds to the request.[71]

CONCLUSION

Nothing in the paper trail leading to the adoption of Rule 23(f) indicates that those responsible for its enactment (*i.e.*, the Judicial Conference, the Supreme Court and Congress) considered the availability (or desirability) of Supreme Court review after either the grant or denial of a Rule 23(f) petition. And there is certainly no reason to think that those who participated in the process intended that its enactment would result in the Court having jurisdiction to review class certification decisions on an interlocutory basis when a court of appeals declines to conduct its own review. Yet that is seemingly what has occurred: Rule 23(f) has brought within the jurisdictional reach of the Court the ability to review district court class certification rulings following a request for appeals court review in accordance with the Rule.[72]

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336 (1969) (amendment to Rule 23 "did not and could not" change "the scope of the congressionally enacted grant of jurisdiction to the district courts").

70. Congress is free to repeal or alter Rule 23(f) at any time, and similarly it can amend Section 1254(1) to foreclose the Court's power to review class certification rulings, unwittingly made possible with the enactment of Rule 23(f).

71. Even if the Court has jurisdiction to review a class certification order when a court of appeals has denied review under Rule 23(f), it presumably will only do so when the class certification order presents issues that are otherwise worthy of a grant of certiorari. Moreover, the fact that a court of appeals has not evaluated the propriety of the district court's certification order may be an additional consideration weighing against a grant of certiorari.

72. Although the federal system generally disfavors interlocutory appeals, Rule 23(f) was enacted in accordance with 28 U.S.C. § 1292(e), which specifically authorizes the adoption of rules designating certain kinds of orders as immediately appealable. *See Cunningham v. Hamilton County, Ohio*, 527 U.S. 198, 210 (1999) ("Congress'[s] designation of the rulemaking process as the way to define or refine when a district court ruling is 'final' and when an interlocutory order is appealable warrants the Judiciary's full respect."). Nothing in the language or history of Section 1292(e) suggests such orders

Of course, some Supreme Court Justices might reach different conclusions were they to address the jurisdictional issues raised by Rule 23(f) petitions discussed here, and it is likely that any decision by the Court would reflect divisions like those in *Hohn* and would be exceedingly close. Nonetheless, when presented with an appropriate case, the Court should address these issues. A decision applying Section 1254(1) to Rule 23(f) petitions would not only offer guidance to class action plaintiffs and defendants, but would also clarify similarly unresolved jurisdictional issues related to Section 1292(b), and to other appeals by permission that might be adopted in accordance with 28 U.S.C. § 1292(e).

cannot be reviewed by the Supreme Court, provided that they come to be "in" the court of appeals.